

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding a Native allotment application to have terminated as a matter of law.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A decision finding a Native allotment application terminated by operation of law pursuant to 43 C.F.R. § 2561.1(f) for failure to file proof of use and occupancy within 6 years after filing the application is properly affirmed when the applicant's use and occupancy began 2 months before the application was filed and no evidence of use and occupancy was filed within 6 years. Although notice and an opportunity for a hearing are generally required before a Native allotment application is rejected on the ground of the sufficiency of the evidence, no hearing is required when no evidence of 5 years of use and occupancy was tendered in support of the application and, hence, it is deficient as a matter of law.

APPEARANCES: Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought from a December 13, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), finding the Native allotment application of Petla Apalayak to have terminated as a matter of law. The basis for the holding was Applicant's failure to file evidence of use and occupancy of the lands applied for within 6 years of filing the application as required by regulation. 43 C.F.R. § 2561.1(f).

The Native allotment application in this case was filed on October 24, 1961, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native

Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994), subject to pending applications. The application asserted use and occupancy since August 6, 1961. Applicant was advised by BLM of the requirement to file proof of use and occupancy within 6 years from the date of filing the application, i.e., by October 23, 1967. When the Applicant failed to file evidence of use and occupancy within 6 years, the case file was closed by BLM. As the file was closed without further notice to Applicant, the case was subsequently reviewed again by BLM citing this Board's decision in Michael Gloko, 116 IBLA 145 (1990).

Upon further review, BLM found that the land within the allotment application had been conveyed to the Bristol Bay Native Corporation on May 7, 1979, by interim conveyance pursuant to ANCSA. Because the lands were no longer in Federal ownership after the 1979 conveyance, BLM held that the Native allotment could not be statutorily approved pursuant to section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1994), which generally provided that Native allotment applications pending "on or before" December 18, 1971, describing lands which were unreserved on December 13, 1968, are subject either to statutory approval or adjudication under the terms of the Native Allotment Act. With respect to adjudication under the Native Allotment Act, BLM held that proof of use and occupancy "must" be filed within 6 years of filing the application under the applicable regulation at 43 C.F.R. § 2561.1(f). Since the Applicant failed to submit evidence of use and occupancy within this time frame, BLM issued the Decision under appeal holding that "the application is legally defective and must be terminated as a matter of law."

In the Statement of Reasons (SOR) for appeal, Appellant contends that termination of the application without an evidentiary hearing is a violation of his due process rights, citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Appellant asserts that section 905 of ANILCA requires adjudication pursuant to the Native Allotment Act of applications pending on or before December 18, 1971, which were erroneously rejected without a hearing. Further, Appellant contends that disposition of this case is controlled by the Board's decision in Michael Gloko, *supra*.

Counsel for BLM has filed a Motion to Dismiss and Answer. It is pointed out by BLM that title to the land has been conveyed out of Federal ownership, noting that in section 1410 of ANILCA Congress provided that interim conveyances to Native corporations shall have the effect of patents. 43 U.S.C. § 1621(j)(1) (1994). Thus, BLM contends that it no longer has jurisdiction to adjudicate title to the land, although it may properly conduct an inquiry into the necessity of bringing suit to seek cancellation of the patent, citing Bay View, Inc., 126 IBLA 281 (1993). Counsel argues that BLM had no jurisdiction to adjudicate title to the land at the time of the Decision under appeal, and that the Decision is not a final decision adjudicating title which may be appealed to the Board. In addition, BLM asserts that no hearing is required when it appears from the face of the application that the applicant is not qualified.

In a reply brief, Appellant contends that his due process rights were violated because he was never notified that his application was closed and given an opportunity to appeal prior to the Decision on appeal. Further, Appellant asserts that BLM has the obligation to determine the validity of his application and should hold an Aguilar hearing. ^{1/} Appellant opposes the Motion to Dismiss, arguing that the Bay View case is distinguishable.

As a threshold matter, we address the Motion to Dismiss filed by BLM. We find this case distinguishable from Bay View. This Board has held, as recognized by BLM, that section 905 of ANILCA did not serve to legislatively approve Native allotments of lands such as those involved in the present case which had been conveyed out of Federal ownership ^{2/} at the time of enactment of ANILCA (December 2, 1980) in light of the major constitutional implications of a taking of property without due process of law to which a contrary holding would give rise. See, e.g., Heirs of Doreen Itta, 97 IBLA 261, 265 (1987). Further, since legal title to the land had been conveyed, BLM has no further jurisdiction to adjudicate title to the tract. Bay View, Inc., 126 IBLA at 287. Accordingly, we found in Bay View that to the extent BLM made a preliminary determination to accept a revised allotment description, an appeal by a Native corporation holding title to the land was properly dismissed as premature since BLM lacked jurisdiction to adjudicate title to the land. As to the case before us, however, the BLM finding that Appellant's allotment application terminated as a matter of law was a final decision adversely affecting the Appellant which was properly subject to appeal. 43 C.F.R. § 4.410. Hence, the Motion to Dismiss the appeal is denied.

The Secretary of the Interior has a special fiduciary responsibility to Native Americans, in this case, Native Alaskans (i.e., Indians, Aleuts, and Eskimos), especially in matters related to the protection of Indian property rights. See Aguilar v. United States, 474 F. Supp. at 846. Thus, in the context of this case, it was appropriate for BLM to review the application to make a preliminary determination whether the applicant had a claim to an allotment for the lands at the time of conveyance which would warrant initiation of action to recover the land for the benefit of the applicant. Bay View, Inc., 126 IBLA at 287; see Heirs of Doreen Itta, 97 IBLA at 265.

^{1/} The reference is to the stipulated procedures negotiated by the parties to Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

^{2/} The land at issue here, as noted above, was the subject of an interim conveyance to a Native corporation in 1979. The legal significance of the term "interim conveyance" is set forth in the regulatory definition:

"Interim conveyance as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land."

43 C.F.R. § 2650.0-5(h). See also 43 U.S.C. § 1621(j) (1994).

[1] The Board has not found the notice and hearing requirement applicable, however, in those cases in which "taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act." E.g., Franklin Silas, 117 IBLA 358, 364 (1991), aff'd Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996); Agness Mayo Moore, 91 IBLA 343 (1986); Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1. This principle was applied by the Board to a case involving the regulation at 43 C.F.R. § 2561.1(f) in Heirs of Edward Peter, 122 IBLA 109 (1992), followed, Jacqueline Dilts, 145 IBLA 109 (1998). 3/ Under that regulation, the failure to file evidence of 5 years of use and occupancy within 6 years of filing the application caused the application to terminate. 43 C.F.R. § 2561.1(f). Indeed, the language of the regulation provides that, in the absence of submission of proof within 6 years, the application "will terminate." As noted in the Peter decision, this regulatory language was promulgated subsequent to the amendment of the Native Allotment Act to require "proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." 122 IBLA at 114.

In the Peter case, the Native allotment application at issue was filed in February 1962 alleging commencement of use and occupancy in June 1961. When the applicant failed to provide evidence of 5 years of use and occupancy within 6 years of filing the allotment application despite notice from BLM of the necessity of submitting evidence, BLM notified the applicant that the allotment application had terminated pursuant to the regulation currently codified at 43 C.F.R. § 2561.1(f). After noting that the language of the regulation provided in its own terms that an application will terminate if the allotment applicant does not provide evidence within 6 years, the Board held that no hearing was required under Pence when no evidence of 5 years of use and occupancy was submitted within 6 years of filing the application. Rejecting the assertion that a hearing was required to review the evidence as to whether the applicant established qualifying use and occupancy, the Peter decision held the "declaration of termination did not constitute an implicit factual assessment of Peter's original application or of any other proof of use and occupancy, but was a legal conclusion derived from the absence of any such proof in the record."

122 IBLA at 115. We find this precedent to be controlling in the context of the present appeal where the application was filed October 24, 1961, indicating use and occupancy commenced August 6, 1961, but no evidence of 5 years of use and occupancy was filed with BLM within 6 years of filing the application.

3/ In our Dilts opinion we specifically addressed the challenge to the propriety of the Peter decision in light of the prior Board decisions in Gloko and Andrew Balluta, 122 IBLA 30 (1992). We found that a Native allotment application was properly rejected without a hearing for failure to provide any evidence of the statutorily required use and occupancy. Our decisions in Gloko and Balluta were expressly overruled to the extent they are construed to require a different result. Jacqueline Dilts, 145 IBLA at 116.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

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